ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of WAI'OLA O MOLOKA'I, INC. For review and approval of rate increases; revised rate schedules; and revised rules.	)	Docket No. 2009-0049

2009 OCT 28 P 3:00
PUBLIC UTILITIES COMMISSION
FILED

MOLOKAI PROPERTIES LIMITED'S MOTION FOR RECONSIDERATION OF PORTIONS OF ORDER GRANTING THE MOTIONS TO INTERVENE FILED BY THE COUNTY OF MAUI AND STAND FOR WATER ENTERED OCTOBER 16, 2009

MEMORANDUM IN SUPPORT OF MOTION

and

CERTIFICATE OF SERVICE

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Partnership

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PROPERTIES LIMITED

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MOLOKAI PROPERTIES LIMITED ("MPL"), by and through its attorneys, Chun Kerr Dodd Beaman & Wong, a Limited Liability Law Partnership, hereby respectfully moves the Hawaii Public Utilities Commission (the "Commission"), pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-41 and 6-61-137, for reconsideration of portions of its Order Granting The Motions to Intervene Filed By The County Of Maui And Stand For Water entered October 16, 2009 (the "Intervention Order").[1]

[1] The Intervention Order was served on the movant, Molokai Public Utilities, Inc., on October 16, 2009, by mail. In accordance with HAR §§ 6-61-137, 6-61-21(e) and 6-61-22, a motion for reconsideration of the Intervention Order should be filed with the Commission no later than October 28, 2009.

Specifically, as further discussed in the memorandum attached hereto, MPL seeks reconsideration of Ordering Paragraph 3 and Section II.B of the Intervention Order, in which MPL is named as a party to this proceeding.

Pursuant to HAR § 6-61-41, MPL does not request a hearing on this Motion.

DATED: Honolulu, Hawaii, October 28, 2008.

ANDREW V. BEAMAN

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Attorneys for MOLOKAI
PROPERTIES LIMITED

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MEMORANDUM IN SUPPORT OF MOTION

On August 14, 2008, the Hawaii Public Utilities Commission (the "Commission") issued an order approving temporary rate relief to applicant Wai'ola O Moloka'i, Inc. ("Wai'ola") in Docket No. 2008-0115. As part of that order, the Commission ordered Wai'ola to file an application for a rate increase within six months. In compliance with that order, as later amended, Wai'ola filed an application for a rate increase under Hawaii Revised Statutes ("HRS") § 269-16 in this docket.

Under HRS § 269-16, Wai'ola, as the regulated utility, is the party in interest and has the burden of proof in providing information in the proceeding to support its requested relief for an increase in rates.

No claims or request for relief, other than Wai'ola's application for a rate increase, have been asserted by any party to this docket.

On October 16, 2009, the Commission issued its Order Granting Motions To Intervene Filed By The County of Maui And Stand For Water (the "Intervention Order") herein. In particular, Ordering Paragraph 3 of the Intervention Order states the following: "MPL is named as a party to this proceeding." Intervention Order at 23.

MPL simply has no role to play in this case. Under Hawaii Administrative Rules ("HAR") § 6-61 (the Rules of Practice and Procedure Before the Public Utilities Commission), "[p]arty has the same meaning as in section 91-1(3), HRS" and "includes a participant where the context requires." HAR § 6-61-2. Pursuant to HRS §91-1(3), "[p]arty means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding."

A party to a proceeding is one who seeks relief or against whom relief is sought. Under Hawaii law, the "real party in interest" is the party who has the right sought to be enforced. Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Haw. 251, 151 P.3d 732 (Haw. 2007). In this case, the "right sought to be enforced" is the right to a rate increase under HRS § 269-16, and the party who has the right to seek a

rate increase is Wai'ola, the regulated utility holding the Certificate of Public Convenience and Necessity ("CPCN"), not MPL. While Wai'ola is a wholly owned subsidiary of MPL, the fact remains that MPL has not sought any relief from this Commission and no party has sought any relief from this Commission against MPL. Therefore, MPL should not be a party.

MPL is not a "public utility" as defined in HRS § 269-1 and does not hold a CPCN. MPL did not ask to be named as a party to this docket, and no other party asked the Commission to join MPL as a party. Hence the Commission has neither general supervisory powers nor investigative powers over MPL under HRS Chapter 269. Therefore, as Commissioner Kondo correctly noted, the Commission has no jurisdiction over MPL. *See, e.g.*, P.U.C. v. Honolulu Rapid Transit, 56 Haw. 115, 119, 530 P.2d 742, 745 (1975) (Commission's authority limited to 'public utilities').

HAR) § 6-61-137 states that "[a] motion seeking any change in a decision, order, or requirement of the [C]ommission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful or erroneous."

By this motion, MPL requests reconsideration of Ordering Paragraph 3 of the Intervention Order, which names MPL as a party to this proceeding. The Commission's decision to name MPL as a party in this type of proceeding is unprecedented, unreasonable, unlawful and erroneous, for the reasons set forth below.

In its motion to intervene, the County asserted that a Hawaii Department of Health ("DOH") hearing officer had determined that Wai'ola and MPL were "one and the same" and that the First Circuit Court had affirmed that decision. Intervention Order at 8.[2] The County failed to note, however, that MPL has taken an appeal from that decision, as stated in MPL's letter to the Commission dated August 27, 2008 in Docket No. 2008-0115. The decision therefore is not binding upon the parties. Robinson v. Ariyoshi, 65 Haw. 641, 651, 658 P.2d 287, 296 (1982). The decision of the DOH hearing officer was incorrect for both substantive and procedural reasons, and the Intermediate Court of Appeals will hear those issues in due course.

The County argued that, because the corporate veil had been pierced by the DOH hearing officer, MPL's finances "must be considered" here. Intervention Order at 8. Apparently the

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[2] MPL cites here to the Commission's characterization in the Intervention Order of Intervenors' representations and arguments. MPL was not served with any of the instant motion papers, since no party sought to name MPL herein.

Commission agreed. In Section II.B of the Intervention Order, the Commission stated:

> In [Docket No. 2008-0115], the commission named MPL as a party to the docket since "MPL is affiliated with the Utilities, and owns property associated with the Utilities' service territories[.]" The commission reaffirmed its decision to name MPL as a party to [Docket No. 2008-0115] in a subsequent order stating that MPL was a necessary party to the proceeding to "flesh out the issue[s]." In particular, the commission maintained that a potential issue is MPL's promise made in WOM's "application for a certificate of public convenience and necessity ("CPCN") that losses sustained by [Wai'ola] in its operations will be covered by additional capital contributions from Molokai Ranch, Limited [nka, MPL] or by loans." As noted in that order, MPL's promise was acknowledged by the commission in granting WOM's its CPCN.
>
> Consistent with the above, the commission finds that designation of MPL as a party to this proceeding to be appropriate and reasonable. Through this designation, the commission is assured that WOM, whether individually or jointly through its parent entity, MPL, should be able to provide the commission and other parties to this proceeding with the information needed to develop a complete record in this proceeding.
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> Based on the foregoing, the commission concludes that MPL should be designated as a party to this proceeding.

Intervention Order at 21-22 (footnotes omitted).

MPL respectfully disagrees. The Intervention Order implies that MPL had somehow promised to fund Wai'ola's losses in perpetuity -- which is not at all accurate, according to documents on file with the Commission. Nothing in the original

CPCN application docket, Docket No. 7122, suggests that Wai'ola ever waived its right to seek a rate increase under HRS § 269-16. Decision and Order No. 12125, entered January 13, 1993 in Docket No. 7122, clearly states (at page 7) as follows:

> The proposed user charge per 1,000 gallons is $1.85. This rate gives Applicant a gross profit of 61 cents per 1,000 gallons sold. Applicant anticipates that, even at this rate, operating expenses will exceed gross revenues for the present time. However, both Molokai Ranch and Wai'ola believe that current market conditions will not permit increasing the rates to the level necessary to provide a return on invested capital. Applicant anticipates that revenues will increase with the development of Maunaloa Village. **It plans to request a rate increase for future improvements to the distribution systems when market conditions improve.**

(Emphasis added.) Thus the Commission clearly understood at the time that it issued the CPCN that Wai'ola would probably seek future rate increases, as is its right under HRS § 269-16.

In the original CPCN application, filed in Docket No. 7122 on October 14, 1991, Wai'ola clearly indicated (at § 12, page 5) that its parent company could not be expected to fund the utility at a loss in perpetuity:

> Molokai Ranch, Limited has decided that it will recoup its investment in the water system through water rates and not through land sales. It is a condition precedent to the transfer of assets by Molokai Ranch, Limited that Applicant receive the Commission's approval of this method of transfer and confirmation that the exchange of water system assets for stock will be deemed to be for value and not contributions-in-aid-of-construction.

The clear intent of this provision was to prevent buyers of lots from opposing future rate increases on the basis of the contribution-in-aid-of-construction doctrine. *See, e.g.*, Puhi Sewer & Water Co., Inc., 83 Haw. 132, 925 P.2d 302 (1996). The Commission clearly understood that. In its Decision and Order (at ¶ V, page 9), the Commission said: "for rate making purpose we will determine **in the next rate case** whether such transfer will be deemed as a contribution-in-aid-of-construction" (emphasis added).

Since Wai'ola, not MPL, has the burden of proof under HRS § 269-16, it is unnecessary to join MPL. In MPL's view, the issue of whether the corporate veil should be pierced is: (1) beyond the jurisdiction of the Commission; and (2) completely irrelevant to the rate making process. Nor will it serve the interest of any party to litigate the issue of whether the corporate veil should be pierced in this forum. Rather, that issue should be left to the courts. In any event, Wai'ola can and will provide all information requested by the Commission relevant to its rate application.

The Intervention Order refers to a number of other unsubstantiated allegations raised by the Intervenors. For example, the Intervenors raise issues about water quality (Intervention Order at 15), but there is no evidence that the quality of the water supplied by Wai'ola fails to meet any legal standard -- and if there were a legitimate concern about the

issue, the obvious solution would be to allow an increase in Wai'ola's rates so as to make it financially viable. The Intervenors argue that Wai'ola lacks authority to pump water from Well No. 17 (Intervention Order at 15), but that issue is within the exclusive jurisdiction of CWRM.[3] In any event, the Commission's rules require consideration of facts not of record to be substantiated by affidavit. HAR § 6-61-41(b). These allegations do not provide a sufficient basis for involuntary joinder of MPL.

Nor should such issues be considered relevant in this case, because Wai'ola has not included the legal expenses associated with those issues in its projected operating expenses. "[O]rthodoxy in public utility rate making suggests four sequential determinations should precede the ultimate rate decision." In Re Hawaiian Telephone Co., 67 Haw. 370, 378, 689 P.2d 741, 747 (1984). These four determinations are: (1) the gross utility revenues; (2) the operating expenses; (3) the rate base; and (4) the rate of return. *Id.* For that reason, "[o]ur function in rate making is a limited one." *Id.*, 67 Haw. at 379, 689 P.2d at 747.

While the Commission, in the Intervention Order, warns the Intervenors against "unreasonably" expanding the scope of the issues in this case (Intervention Order at 20), it is not clear just what that means or what issues the Commission expects the

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[3] *See* note 2 above.

parties to address. It is not clear whether MPL must introduce evidence related to the County's allegation that the corporate veil should be pierced. It is not clear whether MPL must address, for example, the allegation that Wai'ola does not have the legal right to pump water from Well 17 -- an issue that has nothing to do with the rate application that Wai'ola filed in compliance with the Commission's order of August 14, 2008.

The Commission appears to blame the whole state of affairs on MPL, noting that "this general rate case proceeding arises out of MPL's 'announcement' in late March 2008 of its intent to cease . . . its public utility operations" (Intervention Order at 19). Again, MPL respectfully disagrees. Wai'ola informed the Commission of its financial troubles in March 2008, consistent with its legal obligation to keep the Commission informed of its financial condition. And by letter to the Commission dated September 8, 2008, after the Commission had issued its temporary rate order, Wai'ola rescinded all prior notices of intent to terminate operations.

MPL is not aware of any other rate case proceeding in which an entity that is **not** regulated by the Commission or subject to its regulations is required to be a party simply because it is related to a regulated utility. The Intervention Order appears to utilize that rationale by citing to the temporary rate proceeding in Docket No. 2008-0115 in which MPL was named a party given (a) its affiliation with the utility; and

(b) that it owns property associated with the utility's service territory; and (c) MPL's supposed promise in its CPCN proceeding to cover operational losses through additional capital contributions or by loans. Intervention Order at 21-22. The circumstances surrounding this rate case proceeding are entirely different from those that faced the Commission in the temporary rate proceeding which it initiated in Docket No. 2008-0115. The reasons relied upon to justify naming MPL as a party to this proceeding are therefore no longer valid.

A party who appears before the Commission has the right to due process. In Re Hawaiian Electric Co., Inc., 5 Haw.App. 445, 448, 698 P.2d 304, 308 (Haw.App. 1985). "The utility's due process right includes a meaningful opportunity to be heard." *Id.* Naming MPL as a party to these proceedings without prior notice or an opportunity to be heard is a violation of MPL's due process rights. Due to the nature of these proceedings, *i.e.*, a rate case filed pursuant to HRS § 269-16, MPL had no notice or expectation, reasonable or otherwise, that it would be made a party to this proceeding given that: (a) it is not a public utility; (b) it is not subject to regulation by the Commission; (c) it was not an applicant in this docket; and (d) it did not seek to become a party. None of the intervenors moved to join MPL as a party, nor did the Commission initiate any proceeding to address the issue and provide MPL notice and an opportunity to weigh in on the issue.

It is the Commission's obligation to provide the parties with notice of what the issues will be. In Re Hawaiian Electric Co., Inc., *supra*. Under HRS § 91-9(a), "all parties shall be afforded an opportunity for hearing after reasonable notice," which at a minimum must include "an explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof." Here, MPL has had no such notice. The Commission's Intervention Order cites certain largely unsubstantiated allegations made by the Intervenors -- which, if accepted, would justify an increase and not a decrease in water rates -- but does not explain why or how these unsubstantiated allegations relate to the rate-making process. It is not at all clear from the Intervention Order what claims are being made against MPL or what facts or issues the Commission expects the parties to present evidence on.

"Of course, due process and HRS § 91-9 requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues." Application of Hawaii Electric Light Co., Inc., 67 Haw. 425, 690 P.2d 274 (1984). If MPL is to be joined as a party, due process and the statute require the Commission to give MPL sufficient advance notice of the claims made against it to allow MPL to respond meaningfully.

For the reasons set forth above, MPL hereby respectfully requests that the Commission issue an order

modifying Ordering Paragraph 3 of the Intervention Order by deleting the requirement that MPL be a party to this proceeding.

DATED: Honolulu, Hawaii, October 28, 2008.

ANDREW V. BEAMAN

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was duly served on the following parties, by hand delivery or mail, postage prepaid, to their last known addresses set forth below, on this date:

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